

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL
92178-s76K BY JUDD BINLEY AND)	ORDER
PATRICK AND LAURETTA GLEASON)	

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on September 11, 1995. Objector filed timely exceptions to the Proposal but did not request an oral argument hearing.

The Proposal recommended granting a beneficial water use permit to appropriate 15.00 gallons per minute up to 1.00 acre-foot of the waters of Lindbergh Lake for domestic use. The point of diversion shall be in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, Township 19 North, Range 17 West, Missoula County, Montana. The place of use shall be in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13. The period of appropriation and use shall be from January 1 to December 31, inclusive of each year. The means of diversion will be a 0.75 horsepower submersible electric pump. The means of conveyance will be approximately 75 to 100 feet of one-inch pipeline laid along the floor of the lake, then approximately 300 feet of one-inch pipeline buried at a depth of 12 to 24 inches to the cabin, a lift of approximately 60 feet.

The Exceptions make several bald assertions of hearing examiner bias and prejudice. Indeed, bias seems to be the overriding complaint of the Exceptions. The Department has reviewed the record and the Proposal for Decision. The findings of fact appear amply supported by the record and the Department

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agrees with the Hearing Examiner's application of the law to the facts. There is no indication that bias may have influenced the decision.

Objector is mistaken that Mr. Good's testimony was stricken from the record. Mr. Good appears in the record as a witness for the Objector and his testimony was heard and considered. The fact that Mr. Good was not recognized as a party of record did not bar his testimony.

Objector's easement, zoning, and environmental arguments are issues the Department is without authority to act upon in water use permit proceedings such as this.

Having given the exceptions full consideration, the Department of Natural Resources and Conservation adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision for this Final Order. Based upon the Findings of Fact and Conclusions of Law, the Department of Natural Resources and Conservation makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Beneficial Water Use Permit 92178-s76K is issued to Judd Binley, Patrick Gleason, and Laurretta Gleason to appropriate 15.00 gallons per minute up to 1.00 acre-foot of the waters of Lindbergh Lake for domestic use. The point of diversion shall be in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, Township 19 North, Range 17 West, Missoula County, Montana. The place of use shall be in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13. The period of appropriation

and use shall be from January 1 to December 31, inclusive of each year. The means of diversion will be a 0.75 horsepower submersible electric pump.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

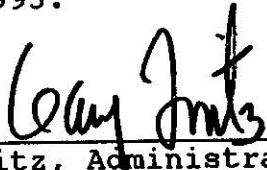
B. The issuance of this permit by the Department in no way grants the appropriator any easement rights or the right to enter upon the property of other persons or National Forest system lands to exercise this permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 14 day of November, 1995.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 15th day of November, 1995, as follows:


Judd Binley
Patrick and Laurretta Gleason
21895 Raintree Ln.
El Toro, CA 92630

Stacy B. Good
HC 31 Box 2043
Seeley Lake, MT 59868

Lindbergh Lake Homeowners
Association
P.O. Box 490
Seeley Lake, MT 59868

Curt Martin, Manager
Karl Uhlig, WRS
Wes McAlpin, WRS
Missoula Water Resources
Regional Office
P.O. Box 5004
Missoula, MT 59806-5004
(via electronic mail)

Vivian A. Lighthizer
Hearing Examiner
Department of Natural
Resources and Conservation
1520 East 6th Ave.
Helena, MT 59620



Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
92178-s76K BY JUDD BINLEY AND)	DECISION
PATRICK AND LAURETTA GLEASON)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 31, 1995, in Seeley Lake, Montana, to determine whether a permit should be granted to Judd Binley and Patrick and Laretta Gleason for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicants Judd Binley and Patrick and Laretta Gleason appeared at the hearing by and through Patrick Gleason.

Wallace Small, former owner of Applicants' property, appeared at the hearing as a witness for Applicants.

Objector Stacy B. Good appeared at the hearing *pro se*.

Henry Kerry Good, III, appeared at the hearing with Objector Stacy B. Good.

Lindbergh Lake Homeowners Association appeared at the hearing as interested persons and Louis Whitsell was allowed to make a statement at the hearing.

Karl Uhlig, Water Resources Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), attended the hearing.

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EXHIBITS

Applicants offered four exhibits for the record. All were received without objection.

Applicants' Exhibit 1 is a copy of a letter from Diamond L Bar Studios, Ron Ukrainetz, to Pat Gleason dated August 31, 1994.

Applicants' Exhibit 2 is a copy of a 28-page document entitled *A Water Quality Evaluation of Lindbergh Lake and Recommendations for Further Study* (Lindbergh Lake report) prepared by Ken Knudson.

Applicants' Exhibit 3 consists of 20 pages which are copies of the discharge in cubic feet per second of Swan River near Condon, Montana, at Station 12369200 for the years 1973 through 1992.

Applicants' Exhibit 4 consists of two pages and is a copy of a warranty deed transferring ownership of certain property from Wallace E. Small and Annell Small to Judd Binley, Patrick W. F. Gleason, and Laurretta V. Gleason.

Objector offered nine exhibits for the record. Applicant objected to all nine exhibits on the basis that these exhibits have nothing to do with water rights, but rather are matters of zoning and easements. Mr. Gleason's objection is sustained and none of Objector's exhibits are accepted for the record.

Objector's Exhibit A is a copy of a letter dated January 19, 1995, to Peter Nielsen, Missoula County Health Department, from Henry Kerry Good, III.

Objector's Exhibit B consists of two pages and is a copy of a letter dated January 23, 1995, to Peter Nielsen, Missoula County Health Department, from Henry Kerry Good, III.

Objector's Exhibit C consists of seven pages and is a copy of a letter dated June 4, 1995, to Marny McClain, Deputy County Attorney, from Henry Kerry Good, III.

Objector's Exhibit D is copy of an Office Memo dated June 1, 1995, to Ken Cope, Subdivision Section, WQD, from Kevin Keenan, Enforcement, WQD.

Objector's Exhibit E is a copy of a seven-page letter dated June 4, 1995, to Ken Cope, Chief, Subdivision Bureau of the Montana Department of Health and Environmental Sciences, from Henry Kerry Good, III, and a copy of a well log.

Objector's Exhibit F consists of two pages. The first page is a copy of a Sewer Permit Checklist and the second page is a copy of a plat map entitled "Supplemental Data Sheet."

Objector's Exhibit G is a copy of a Sewer Permit and Application completed by Judd Binley.

Objector's Exhibit H consists of three pages. The first two pages are a copy of a letter dated April 11, 1980, to Wallace Small from the Department of Health and Environmental Sciences. The third page is a copy of a proposed water system for Wallace E. Small dated April 15, 1980, which was stamped "Approved" on April 17, 1980.

Objector's Exhibit I consists of three pages. The first page is a copy of a plat map upon which has been drawn two yellow

lines that resemble a road. The second and third pages are a copy of a Certificate of Subdivision Plat Approval issued by the Department of Health and Environmental Sciences dated April 4, 1980.

PRELIMINARY MATTERS

Prior to the hearing, a site visit was performed. The original plan had been for all parties to meet at the turnoff to Lindbergh Lake at 10:30 a.m. The Hearing Examiner was not aware of that plan. She assumed, in error, that the parties were to meet at the point of diversion and place of use, which she did inspect in the company of Karl Uhlig. Patrick Gleason and Mr. and Mrs. Good were at the Lindbergh Lake turnoff when the Hearing Examiner and Karl Uhlig returned to the highway. Returning to the site with all parties was discussed; however, it was generally agreed that since the Hearing Examiner had seen what she needed to see, there was no point in repeating the process. Later, during the hearing, Objector Stacy Good objected to the fact that the Hearing Examiner made the site visit without her and that the Hearing Examiner may have been influenced by other persons at the site. The Hearing Examiner assured Mrs. Good this was not the case.

During the prehearing meeting, the Hearing Examiner noted that Stacy Good's objections were based upon zoning and easement concerns. Since the Department has no jurisdiction over such matters, the Hearing Examiner advised the parties she would not hear testimony concerning those issues. Stacy Good objected to

that statement. Mrs. Good then stated that Applicants do not have possessory interest in the point of diversion. The Hearing Examiner explained off the record that an applicant does not need to have possessory interest in the point of the diversion, only in the place of use. Mont. Code Ann. § 85-2-311(f) (1993).

Mr. Good requested the Hearing Examiner to leave the record open so that their attorney could have a chance to question one of the witnesses. Mr. Gleason objected to that request on the basis that the attorney was not representing Stacy Good at the hearing. The Hearing Examiner sustained the objection at the hearing and now affirms that decision. Mr. Good is not an objector and therefore does not have the right to request the record be left open. Moreover, Stacy Good had known since July 3, 1995, the hearing would be held on July 31, 1995, which is ample time in which to obtain an attorney. Had she obtained an attorney for this hearing, that attorney would have requested a continuance if he could not attend the hearing. The Hearing Examiner did not receive such a request and must assume therefore that an attorney was not retained for the hearing. Mr. Whitsell, Lindbergh Lake Homeowner's Association, stated that the Homeowners Association had retained the attorney to represent them for the zoning and easement problems.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 92178-s76K in the name of Patrick and Laurretta Gleason and Judd Binley and signed by Patrick Gleason and Judd Binley was filed with the Department on November 7, 1994, at 09:16 a.m. (Department file.)

2. Pertinent portions of the file were published in the *Seeley Swan Pathfinder*, a newspaper of general circulation in the area of the source, on March 2, 1995. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Two timely objections were received by the Department. The objection of the Lindbergh Lake Homeowner's Association was declared incorrect and incomplete. They were notified of this ruling by a letter dated April 12, 1995, and were informed that unless the objection was made correct and complete, they would not be able to request a hearing. The objection was never corrected; therefore the Lindbergh Lake Homeowner's Association is not a party to this proceeding. The Department received an objection from Stacy B. Good that was deemed correct and complete and Applicants were notified of the objections by a letter from the Department dated April 12, 1995. (Department file.)

3. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicants seek to appropriate 15.00 gallons per minute up to 1.00 acre-foot of the

waters of Lindbergh Lake for domestic use. The proposed point of diversion is in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, Township 19 North, Range 17 West, Missoula County, Montana.¹ The proposed place of use is in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13. The proposed period of appropriation and use is from January 1 to December 31, inclusive of each year. The proposed means of diversion is a 0.75 horsepower submersible electric pump. The proposed means of conveyance is approximately 75 to 100 feet of one-inch pipeline laid along the floor of the lake, then approximately 300 feet of one-inch pipeline buried at a depth of 12 to 24 inches to the cabin, a lift of approximately 60 feet. (Testimony of Patrick Gleason and Department file.)

4. Applicants have proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed by the Applicants at times when the water can be put to the use proposed by the Applicants and that during the period in which the Applicants seek to appropriate, the amount requested is reasonably available. Lindbergh Lake is located near the headwaters of the Swan River in northeast Missoula County. The volume of the lake is approximately 38,110 acre-feet. Based on calculations completed in the Lindbergh Lake report, the volume of the lake is replaced nearly two times each year. Based on these figures, approximately 70,956 acre-feet of

¹Unless otherwise stated, all land descriptions are located in Township 19 North, Range 17 West, Missoula County, Montana.

water flow into and out of Lindbergh Lake each year. There are 45 listed water rights on Lindbergh Lake. The Department estimates a family of five uses one acre-foot of water per year. If all those water users used the water all year that would total a use of approximately 45 acre-feet per year. However, most of the water users are not in residence during the winter months so the total use would be somewhat less than 45 acre-feet per year. Forty-five acre-feet is a very small portion of the water that flows through Lindbergh Lake, 00.00063 percent. One acre-foot more would be 0.00064 percent of the water that flows through Lindbergh Lake. (Testimony of Patrick Gleason, Department file, and Applicants' Exhibit 3.)

5. Applicants have proven by a preponderance of evidence the water rights of a prior appropriator would not be adversely affected. As stated above, approximately 70,956 acre-feet of water flows through Lindbergh Lake annually. Subtracting the exaggerated current use of 45 acre-feet per year, would leave 70,911 acre-feet per year and further subtracting one acre-foot for Applicants' use would leave 70,910 acre-feet passing through the lake annually. There has never been a recorded water shortage in Lindbergh Lake. (Department file, Applicants' Exhibits 2 and 3, and testimony of Patrick Gleason.)

6. Applicants have proven by a preponderance of evidence the proposed use of water, domestic, is beneficial. Mont. Code Ann. § 85-2-102(2)(a) (1993). Applicants propose to use the water for bathing, cooking, cleaning, laundry, and, if it is pure

enough or can be treated to be potable, for drinking. All of these uses would benefit Applicants.

7. Applicants have proven by a preponderance of evidence the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. There are no unperfected permits or water reservations in the source of supply. (Department records and file.)

8. Applicants have proven by a preponderance of evidence they have possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. They own the proposed place of use. (Applicants' Exhibit 4 and testimony of Wallace Small and Patrick Gleason.)

9. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2.

2. Applicants have met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 9.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 92178-s76K is granted to Patrick and Laretta Gleason and Judd Binley to appropriate 15.00 gallons per minute up to 1.00 acre-foot of the waters of Lindbergh Lake for domestic use. The point of diversion shall be in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, Township 19 North, Range 17 West, Missoula County, Montana. The place of use shall be in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13. The period of appropriation and use shall be from January 1 to December 31, inclusive of each year. The means of diversion will be a 0.75 horsepower submersible electric pump.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

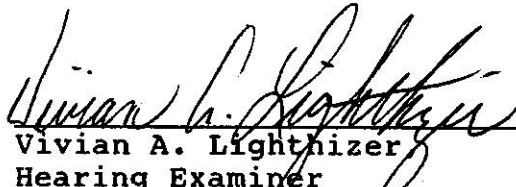
B. The issuance of this permit by the Department in no way grants the appropriator any easement rights or the right to enter upon the property of other persons or National Forest system lands to exercise this permit.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 11th day of September, 1995.


Vivian A. Lighthizer
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6615

MEMORANDUM

The basis for the objections to this application was the fear of setting a precedent for easements through other's property in order to get lake water up to the second tier lot development. (Testimony of Stacy Good, Henry Kerry Good III, and Louis Whitsell.) The Department has no jurisdiction in such matters.

If Applicants meet all the criteria for issuance of a permit, the Department is required to issue a permit. Mont. Code Ann. § 85-2-311(1) (1993). If Applicants do not gain an easement and are in violation of the zoning agreement, they would not be able to exercise a permit issued by this Department for this application. The permit would then be revoked because it could not be perfected.

CERTIFICATE OF SERVICE


This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 11th day of September, 1995, as follows:

Judd Binley
Patrick and Laoretta Gleason
21895 Raintree Ln.
El Toro, CA 92630

Lindbergh Lake Homeowners
Association
P.O. Box 490
Seeley Lake, MT 59868

Stacy B. Good
HC 31 Box 2043
Seeley Lake, MT 59868

Curt Martin, Manager
Karl Uhlig, WRS
Wes McAlpin, WRS
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P.O. Box 5004
Missoula, MT 59806-5004
(via electronic mail)


Cindy G. Campbell
Hearings Unit Legal Secretary